In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1289

LUTHERAN HOSPITAL OF MILWAUKEE, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF HOSPITAL CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF AMICUS CURIAE

Hospital Corporation of America ("HCA") is the parent corporation or manager of approximately 100 investor-owned or nonprofit hospitals in 24 states. HCA's common stock is traded on the New York Stock Exchange. HCA hospitals have a capacity of approximately 15,000 beds and employ approximately 30,000 people. These hospitals provide general medical and surgical care, with the exception of two psychiatric facilities and a women's hospital, which provide specialized care.

This case asks the Supreme Court to delineate the areas of a hospital in which employees, during their non-working time, may engage in the union activities of solicitation and distribution of literature. In the proceed-

ings below, the National Labor Relations Board ("Board") simply adhered, without discussion or analysis, to its ruling in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976) ("*St. John's*") that it is unlawful for a hospital to prohibit solicitation and distribution of literature in areas of the hospital to which patients and visitors have access, and to limit these union activities to employee-only areas of the hospital. *Lutheran Hospital of Milwaukee, Inc.*, 224 NLRB 176 n. 1 (1976).

The Seventh Circuit agreed with the Board in this case, *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, 564 F.2d 208 (7th Cir. 1977). The First Circuit would permit *St. John's* to be applied to a hospital cafeteria and coffee shop, *NLRB* v. *Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977). The *Beth Israel* issue of the lawfulness of a ban on solicitation and distribution in hospital cafeterias and coffee shops is now before this Court in *Beth Israel Hospital* v. *NLRB, cert. granted*, No. 77-152 (Jan. 17, 1978), *and case submitted*, (Apr. 24, 1978).

The District of Columbia Circuit totally disagrees with *St. John's*. *Baylor University Medical Center* v. *NLRB*, ... F.2d ....., 97 LRRM 2669 (No. 76-1940, D. C. Cir., Feb. 14, 1978). The Tenth Circuit also disagrees with *St. John's*, and it denied enforcement to the Board's order in that case, *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368 (10th Cir. 1977). The Sixth Circuit has the *St. John's* issue under submission in *NLRB* v. *Baptist Hospital, Inc.*, No. 76-1675 (6th Cir.).

HCA has hospitals in eight of the eleven federal appellate circuits, including the Sixth, Seventh, and Tenth Circuits and even though HCA has no hospitals in the District of Columbia, Board orders involving HCA's solicitation and distribution rules are subject to review upon petition by HCA in the District of Columbia Circuit as well

as in the Circuits in which the hospitals are located. *See* 29 U.S.C. §160(e)-(f). The conflict among the Circuits with regard to *St. John's* makes it impossible for HCA to draft a solicitation and distribution rule applicable to all HCA hospitals. By the same token, this conflict among the Circuits and the difficulty it is causing hospitals all across the nation make the *St. John's* issue presented in this case most appropriate for the Supreme Court's resolution.

HCA's interest in a solicitation and distribution rule of uniform application is not its only interest in this case. HCA is more deeply interested in this case because it is concerned by *St. John's* in the following respects:

1. *St. John's*, which permits a hospital to ban solicitation and distribution only in "strictly" patient care areas, does not adequately consider the serious negative impact such union activity could have on the quality of patient care. In HCA hospitals, the hallways, stairwells, and elevators must be kept unimpeded to permit passage of cardiac arrest units and medical personnel responding as quickly as possible to emergency calls. In addition, HCA patients, especially immediately post-operative patients, are encouraged—and, in most instances, required—by their physicians as part of their treatment and recovery to get up out of bed, walk around the hospital, and resume such activities as receiving visitors in the lounges and eating meals in the cafeterias. Under *St. John's*, the Board does not consider that these patient-access areas rise to the level of "strictly" patient care areas, and the Board would require a hospital to permit union activity in these patient-access areas in spite of the potential for disruption, commotion, and patient distress such union activities possess.

2. *St. John's* could have a serious impact on the attractiveness of HCA hospitals to patients and physicians

in comparison with other area hospitals. In most of the cities where HCA has hospitals, there are other hospitals and an abundant number of hospital beds giving potential patients a choice as to which hospital to patronize. Physicians make medical judgments as to which hospital provides their patients with the most tranquil atmosphere for treatment. These are medical judgments with a commercial impact on HCA hospitals. Even nonprofit HCA hospitals have no desire to operate at a loss, and all HCA hospitals must maintain economic soundness because HCA is accountable to lending institutions and investors. If union solicitation and distribution were to be taking place in an HCA hospital in the hallways, stairwells, elevators, waiting rooms, gift shops, vending areas, cafeterias, and entrances, patients and visitors—present and future customers of HCA hospitals—could be disturbed and annoyed by this activity, and they could take their business elsewhere. Physicians could admit their patients elsewhere. HCA is concerned that *St. John's* fails to take into account the commercial interests which HCA hospitals have in maintaining an atmosphere free of disruptions.

3. The *Beth Israel* case, which is presently before the Court for decision, is factually limited to union solicitation and distribution in a hospital cafeteria and coffee shop. *Beth Israel's* facts do not involve other major hospital areas to which patients and visitors have access. By contrast, the instant case raises squarely the *St. John's* issue of whether or not a hospital may ban union solicitation and distribution hospital-wide in patient and visitor access areas, for it calls into question "the full scope of *St. John's*," *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, *supra*, 564 F.2d at 216. HCA is concerned about the possibility that *Beth Israel* does not present this Court with a satisfactory vehicle for resolving the *St. John's* issue

in a hospital-wide context. HCA therefore respectfully suggests that the instant case offers the Court a more satisfactory set of facts on which to resolve the *St. John's* issue.

The foregoing concerns lead HCA to have an interest in this case. These same concerns led HCA to file, with the Federation of American Hospitals, *Amicus Curiae* briefs in *St. John's* at the Tenth Circuit level and in *Baptist Hospital* at the Sixth Circuit level.

HCA contends that *St. John's* is erroneous. It is for this and the foregoing reasons that HCA respectfully submits this brief *Amicus Curiae* in support of Lutheran Hospital's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. This brief is submitted with the consent of the parties, and these written consents have been filed with the Clerk. *See* Supreme Court Rule 42(1).

ARGUMENT

I. The Conflict in Circuits

The heart of this case is the validity of *St. John's*. As detailed *supra*, the Circuits are split on this issue. On the one hand, the First Circuit (*Beth Israel*) and the Seventh Circuit (*Lutheran Hospital*) uphold *St. John's*. On the other hand, the Tenth Circuit (*St. John's*) and the District of Columbia Circuit (*Baylor University*) reject it.

HCA respectfully submits that this Court should exercise its discretionary jurisdiction to resolve such a conflict among the Circuits on an issue directly affecting the nation's hospitals, their patients, and their employees.

II. The Board's Ruling in *St. John's* Is Erroneous, and the Error Significantly Affects the Nation's Hospitals and Their Patients and Employees

In urging this Court to grant Lutheran Hospital's petition for certiorari, HCA shall argue that *St. John's* is contrary to the intent of Congress as manifested by its 1974 amendments to the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* ("Act"). HCA shall point out that there is no evidentiary basis for the holding, and sweeping statements, in *St. John's* and its progeny as to patient needs. HCA shall argue that *St. John's* fails to strike a balance between the organizational rights of hospital employees on the one hand and the rights and needs of patients, their visitors, and hospitals on the other hand.[1]

A. Legislative History of the 1974 Amendments to the Act

In the 1974 amendments to the Act extending coverage to nonprofit hospitals (Pub. L. 93-360, 88 Stat. 395 (July 26, 1974)), Congress expressed a strong awareness that the special circumstances present in hospitals required careful tailoring of the Act especially for the health care industry. Congress did not merely "amend out" the nonprofit hospital exemption, but instead it drafted special provisions specifically for the health care industry. Thus,

1. As previously discussed, the Board simply applied *St. John's* to the instant case without discussion or analysis, and the Seventh Circuit affirmed. HCA's arguments focus on *St. John's* not on *Lutheran Hospital*. With regard to the standard of review to be applied to the Board's *St. John's* ruling in the instant case, it is settled that courts must examine the legal foundations on which Board decisions rest, reviewing such decisions for compliance with the mandates of the Act and the congressional policies underlying the Act. This is especially true where, as here, "the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests. . . ." *NLRB* v. *Brown*, 380 U.S. 278, 291-92 (1965).

for example, the Act contains special notice requirements for the picketing and striking of a hospital (Section 8(g)), special notice requirements for collective bargaining, and special requirements regarding mandatory mediation (Section 8(d)).[2]

One searches in vain in the Board's *St. John's* decision for any indication that the Board even took into account, much less wrestled with, the legislative history of the 1974 amendments. One makes a similar fruitless search through the decision of the Seventh Circuit in the instant case.

HCA respectfully submits that it is time for this Court to ascertain congressional intent with regard to protecting hospital patients from the turmoil and disruption which frequently accompanies union organizing activity, as that congressional intent is manifested in the 1974 amendments to the Act.

2. The District of Columbia Circuit saw the reasons why Congress took a different, narrower approach to the application of the Act to hospitals than to other industries:

> The legislative history of the (Act) as it applies to voluntary, non-profit hospitals reveals an unmistakable solicitude for the peaceful functioning of these institutions, even at some expense to employees' right to organize. . . . (I)n the course of amending the scope of the Act's coverage, Congress clearly evinced its belief that these facilities presented special problems which mandated a different approach to the application of the (Act) than that taken in other fields.

Baylor University Medical Center v. *NLRB*, *supra*, ... F.2d at ....., 97 LRRM at 2671. The District of Columbia Circuit went on to quote from the legislative history of the 1974 amendments as contained in the Report of the Senate Committee on Labor and Public Welfare:

> In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act. . . .
>
> * * *
>
> Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions. There was a recog-

(Continued on following page)

B. *St. John's* Lacks an Evidentiary Basis

In *St. John's*, the Board drew distinctions between "strictly" patient care areas and areas to which patients and visitors have access, and between confined and ambulatory patients.

One of the most startling features of *St. John's* is that the record in that case contained no evidence on the foregoing distinctions drawn by the Board. Indeed, as noted by the District of Columbia Circuit:

> The St. John's case was submitted to the NLRB on six stipulations and no evidence was presented on the question of how distribution or solicitation would affect patients.

Footnote continued—

> nized concern for the need to avoid disruption of patient care wherever possible.
>
> It was this sensitivity to the need for continuity of patient care that led the Committee to adopt amendments with regard to notice requirements and other procedures related to potential strikes and picketing.

Sen. Rpt. No. 93-766, 93d Cong., 2d Sess. at 3, 6, reprinted in 1974 U.S. Code Cong. & Admin. News, vol. 2, 3946, 3948, 3951.

With regard to the argument that perhaps Congress was concerned only with preventing the disruptions which would be caused by actual strikes or picketing, the District of Columbia Circuit responded as follows:

> (W)e find no support for such a narrow reading of the congressional purpose. On the other hand, the clear expressions of congressional concern for avoiding disruptions in the hospital environment that we do find in the legislative history encourages us to give special weight to the needs of patients in striking a balance between preventing possible sources of disruptions in hospitals and protecting employees' right to organize. *Moreover, it seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury right be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.*

Baylor University Medical Center v. *NLRB, supra*, ... F.2d at ....., 97 LRRM at 2671 (footnotes omitted, emphasis added).

Baylor University Medical Center v. *NLRB, supra*, ... F.2d at ..... n. 61, 97 LRRM at 2675 n. 61. *See also St. John's Hospital and School of Nursing, Inc.* v. *NLRB, supra*, 557 F.2d at 1372-73.

Since there was no evidence in the *St. John's* record to support the Board's conclusions, it is necessary to examine the Board's reasoning in *St. John's*.

Does sound reasoning support the Board's distinction between confined and ambulatory patients as regards their relative abilities to withstand the unsettling effects of union solicitation and distribution? HCA submits that there is no basis for this distinction. Many seriously ill patients, or patients awaiting surgery or recovering therefrom, are likely to be ambulatory in the modern hospital, where their physicians may encourage and more likely require ambulation as a part of therapy and treatment. Inevitably, a good deal of this therapy and treatment will be taking place in the hallways and other public areas of a modern hospital. It is thus patently unreasonable to conclude, as the Board did in *St. John's*, that only bedridden patients should be protected against the unsettling effects of union activities by hospital employees. It is even more patently unreasonable for the Board to arrogate unto itself the *medical* determination that some patients are "healthy" enough to be exposed to this union activity.

The Board has also drawn a line between hospital areas supposedly devoted to "strictly" patient care and areas accessible to patients and visitors. Just as no line can be drawn between ambulatory and bedridden patients in the modern hospital, no line can be drawn between these areas of a hospital. Evidence before the Court in *Baylor University Medical Center* v. *NLRB, supra*, showed

that "a great deal of the physical therapy undertaken at Baylor actually took place in the corridors, . . ." ..... F.2d at ....., 97 LRRM at 2672.

Moreover, as the Tenth Circuit pointed out in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB, supra,* in the case of *Mount Airy Foundation,* 217 NLRB 802 (1975), which involved the classification of various hospital employees for purposes of forming appropriate bargaining units, the Board refused to draw a distinction between "direct" and "indirect" patient care employees. As the Board stated in *Mount Airy*:

> If any particular fact is evident it is the fact that all employees in the health care industry, sharing as they must a genuine concern for the well-being of patients, are involved in "patient care." The degree or immediacy of such involvement may concededly vary but, . . . distinguishing between "direct" and "indirect" care can fairly be anticipated to be a distinction of specious value.

217 NLRB at 802.

Even the First Circuit in *NLRB* v. *Beth Israel Hospital, supra,* recognized that "a phrase like 'immediate patient-care areas' is far from self-defining given the complexity of a major metropolitan hospital." 554 F.2d at 482 n. 6.

At a minimum, then, *St. John's,* attempting as it does to draw a "distinction of specious value" between "strictly" patient care areas and areas accessible to patients and visitors, leaves open to perhaps years and years of litigation which areas of a hospital belong in each category. *See Lutheran Hospital of Milwaukee, Inc.* v. *NLRB, supra,* 564 F.2d at 216.

The Tenth Circuit reached the correct conclusion with regard to the artificial, unfounded distinctions the Board attempted to draw in *St. John's*:

> We are therefore compelled to conclude that the ultimate factual inferences on which the Board's distinction was based were not drawn from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental, and emotional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations.

St. John's Hospital and School of Nursing, Inc. v. *NLRB, supra,* 557 F.2d at 1373.

It is perhaps unfortunate that this Court has not had the benefit of record evidence concerning the deleterious effects on patients of union activities in patient access areas. This paucity of evidence is probably explainable by the Board's sudden reversal in *St. John's* of its previous policy allowing restrictions on solicitation and distribution in health care facilities in all areas to which patients and visitors had access. As the Tenth Circuit noted in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB, supra*:

> The Board concedes that the Sixth Circuit decision in *NLRB* v. *Summit Nursing Convalescent Home,* 6 Cir., 472 F.2d 1380, upholding a rule prohibiting solicitation and distribution in all patient and public access areas, and its own decision in *Guyon Valley Hospital, Inc.,* 198 NLRB No. 28, upholding restrictions on solicitation in all working areas, accurately represent the state of the law prior to the 1974 amendments to the Act.

557 F.2d at 1374. These were the decisions reflecting Board policy when such cases as *Beth Israel* and the instant case were tried before the Board's Administrative Law Judges and when Congress wrote special provisions into the Act for health care institutions.

Fortunately, abundant evidence was before the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB, supra*:

> Experienced witnesses testified of the extent to which congestion in the corridors impedes the operation of the medical staff and annoys patients and visitors.
>
> * * *
>
> There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital. Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard-taxed emotionally. And the thought that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities.

_____ F.2d at _____, 97 LRRM at 2672, 2673 (footnotes omitted).

The instant case and the District of Columbia Circuit's decision in *Baylor University* provide this Court with adequate facts upon which it can make a decision as to the restrictions which can lawfully be placed on the union activities of solicitation and distribution in patient and visitor access areas of hospitals.

C. *St. John's* Fails to Strike a Proper Balance

HCA submits that *St. John's* fails to strike a proper balance between the interest of hospital employees in engaging in union activities in the work place, and the interests of patients, their visitors, and hospitals in the best possible patient care. As previously discussed, the legislative history of the 1974 amendments evidences a strong congressional concern for the special needs of hospitals to maintain a tranquil atmosphere so that the patients therein are free of all possible distractions and disruptions. This congressional concern calls for a very delicate balancing of interests in order to arrive at a proper solicitation and distribution policy which accommodates the interests of all concerned. The statement of the District of Columbia Circuit merits repeating here:

> (I)t seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury might be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.

Baylor University Medical Center v. *NLRB, supra,* _____ F.2d at _____, 97 LRRM at 2671 (footnote omitted).

There is no reason to dispute that union solicitation and distribution present the possibility of disrupting the normal operations of any business. "By its nature solicitation may be disruptive to the maintenance and operation of the employer's business and essential internal discipline," *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 277 F.2d 759, 762 (5th Cir. 1960), and it "may cause argument and dissension among employees." *TRW, Inc.* v. *NLRB*, 393 F.2d 771, 774 (6th Cir. 1968). No person of sound mind would want to be a patient in a hospital where

the employees are not devoting all their energies to patient care. Even the most ardent union supporter might question whether the best patient care is being provided in a hospital where the employees appear to be devoting their energies to something other than patient care. As a practical matter, would patients and visitors realize that the arguments and dissension accompanying union solicitation and distribution in areas to which they have access—in the very hallways next to patient rooms—are only the activities of employees during their "nonworking time?" Would not the visitors whose loved one's life or death may depend on expert medical care be apprehensive if they observed the hospital employees who provide such care debating and arguing about unions? Would not this apprehension be compounded many times if the overheard arguments involved the possibility of employees walking off their jobs and striking the hospital? At a minimum this apprehension could upset patients and visitors. Indeed, this apprehension could well generate unfounded malpractice claims based solely on the perception of patients and visitors that health care was not being provided when it was supposed to be.[3]

The Board simply did not give adequate consideration to the interests of patients in *St. John's*. Nor could the Board have done so, for the record before it was barren of evidence as to the possibility of patients being upset by solicitation and distribution.

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3. In addition to the evidence before the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB*, *supra*, with regard to the inherently disturbing effect on sick persons of union activities in a hospital, there is evidence in the record before the Sixth Circuit in *NLRB* v. *Baptist Hospital, Inc.*, *supra*, to the same effect. In *Baptist Hospital*, Drs. Greer Ricketson and Russell Birmingham gave uncontradicted testimony as to the medical need to prevent any activity in a hospital which could interfere with the well-being of a patient. Excerpts from this testimony are attached to this brief as an appendix.

With regard to the interests of the hospital, a hospital is extremely interested in the health of its patients. But in addition, a hospital, like any other business, is interested in remaining economically healthy. In a long line of cases the Board and the courts have recognized the commercial interests of a business in providing its customers a tranquil, pleasant atmosphere free of solicitation and distribution practices which tend to be disruptive. *E.g., Marriott Corp.*, 223 NLRB 978 (1976); *McDonald's of Palolo*, 205 NLRB 404 (1973); *May Department Stores*, 59 NLRB 976 (1944), *enf'd*, 154 F.2d 533 (8th Cir. 1945), *cert. denied*, 329 U.S. 725 (1946); *Marshall Field & Co.* v. *NLRB*, 200 F.2d 375 (7th Cir. 1952, *amended*, 1953). Both the Tenth and the District of Columbia Circuits have recognized that a hospital has a similar commercial interest in providing its customers a disruption-free atmosphere. *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, *supra*, 557 F.2d at 1375; *Baylor University Medical Center* v. *NLRB*, *supra*, ... F.2d at ....., 97 LRRM at 2673-74.

Judicial inquiry into a hospital's commercial interests in the solicitation and distribution context to this point has been focused primarily on hospital cafeterias, vending areas, gift shops and the like. With regard to the commercial activity going on in these areas, this Court is aware of the long line of cases involving the limits which can be placed on union activity in the public access areas of restaurants and retail stores in order to protect their commercial interests. These cases have been called to the Court's attention by the *Beth Israel* case. Their applicability to the hospital setting has been discussed by the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB*, *supra*, ... F.2d at ....., 97 LRRM at 2673-74, and by the Tenth Circuit in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, *supra*, 557 F.2d at 1375-76.

The foregoing inquiry is entirely appropriate because a hospital's commercial interest in its cafeterias, gift shops, and the like is indistinguishable from the commercial interest of any restaurant or retail store in immunizing its customers from the disturbances of its employees' union activity. But the foregoing inquiry should be broadened to take into account the fact that a hospital has a commercial interest in the peace of mind of its customers in each and every area of the hospital frequented by patients and visitors. No matter where a patient or visitor is located in a hospital, he is making a consumer's decision on whether or not to continue patronizing that hospital. That decision is based on everything he hears and sees. Similarly, his physician is making a medical decision on whether or not to admit patients to that hospital. Thus, as a practical matter, it makes no difference to a patient, visitor or physician where hospital employees may be observed engaging in union activity. The observation is the same, regardless of whether the employee activity takes place in a hallway, an elevator, a cafeteria, a gift shop, or at the main entrance.

In *St. John's* and its progeny, the Board has shown greater solicitude for the patrons of a McDonald's hamburger stand than for the patients and visitors in a hospital. The Board apparently has a blind spot, for although it is unable to perceive how a *patient* would be adversely affected by exposure to union solicitation and distribution, the Board is able to perceive how the *patron of a hamburger stand* "might gag with rage" at the same activity. *McDonald's of Palolo, supra,* 205 NLRB at 407 n. 18. In other words, while the patron of a hamburger stand has a right "to participate in the eating of his fare free from perhaps exacerbating disturbances which might readily arise from the exercise by the Employer's employees of

their Section 7 rights in working areas even during their nonworking time," *id.* at 407, the ambulatory patient who, by definition, is in the hospital because he is in need of medical care, has no right to be free from such exacerbating disturbances in the hospital hallways, elevators, waiting rooms, cafeterias, or coffee shops.

The Act does not mandate such a situation. There is no basis whatsoever for extending greater protection against disruption and interference to the patrons of restaurants and retail stores than to the patients in the nation's hospitals.

A hospital has a commercial interest in all areas to which patients and visitors have access. This interest of the hospital ought to be taken into account when union solicitation and distribution rules are formulated for hospitals. This interest was not considered by the Board in *St. John's*.

CONCLUSION

For the foregoing reasons, Hospital Corporation of America as *Amicus Curiae* urges the Supreme Court to grant Lutheran Hospital's petition and to decide the extent to which hospitals may ban union solicitation and distribution in areas accessible to patients and visitors.

Dated May 2, 1978.

Respectfully submitted,

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APPENDIX

Excerpts from the record in *NLRB* v. *Baptist Hospital, Inc.*, No. 76-1675 (6th Cir.), *review pending.*

Testimony of Greer Ricketson, M.D.:

First, let me state that I am concerned with the patient's care first, and any other business that might take place in the hospital as far as I as a doctor am concerned, is strictly secondary. So, if I feel any activity within a hospital regardless of whether it be a meeting of some sort or otherwise, I feel interferes with the well being of the patient, then I think it ought not to take place, and without getting too verbose, and we all know a hospital is a place that is a busy place, things are going on continuously all the time, and the people there have jobs to do, and they have to take care of the patients and not only do they have to take care of them, but have to take care of them in the most efficient, quiet and unassuming manner; in other words, not to disturb the patient. A good many of the patients can be upset mentally, psychologically and anyway you might like and may have a definite affect [sic] on the outcome of the case as to whether they get well or not.

For instance, a heart case, maybe he's on a monitor or a pacemaker or whatnot, and certainly this type of case you want him to be perfectly quiet and at ease both physically and mentally, because of the mental upset would raise his blood pressure and might throw him into fibrillation from overupset or tension, so that would be one type of case, and take a cancer case. The patient and the family is [sic] on pins

and needles to start with. Is he going to get through the operation he's going to have. If he gets through the operation, is he going to be cured, or is he still going to have cancer and all these things play in the affect [sic] and the patient's mental attitude is important as well as his physical attitude when he arrives in the operating room as to how well he's going to withstand the trauma of the operation, and so, all these things are important, and what I am saying, there shouldn't be any unnecessary turmoil, confusion, loud noises and things going on that would upset a patient or the patient's family because they go back and if something happens to a patient's family that is upsetting in the hospital, because they go back in and their feelings wear off on the patient, and they themselves irritate the patient by talking about a fight that took place on the first floor or something like that, so it's necessary that they have to maintain an atmosphere of calm and cool.

Source: Transcript 280-82, in Sixth Circuit's Appendix 351-53.

. . . I have tried to explain, psychological attitudes play a good part. If we have a patient that has made up his mind that he's going to die, they can almost will themselves to die.

. . . [I]t doesn't matter whether it's union, and I understand this case has to do with rules and regulations between employers and unions, but it would be the same thing if somebody came through and was selling or soliciting the football gambling sheets.

In other words, there is a nonprofessional attitude going on within the area of the hospital, and if the patient is there, he begins to wonder what kind of

a damn hospital is this. Are they more interested in this than taking care of me, or the family may react the same way, or they may say we thought we were going to a good general hospital whose prime purpose is to get them well if possible and keep them comfortable, and here we see other activities that do not have to do with the taking care of patients and the business of the hospital, and they will get quite upset about it, and not only plain mad at the hospital, but the patient can get quite upset and disturbed and think I must not be in too good a place, and if this sort of things happens in the room, what's going to happen in the operating room, are they going to stop and get in an argument about something else there.

Source: Transcript 287-88, in Sixth Circuit's Appendix 358-59.

Testimony of Russell Birmingham, M.D.:

In the patient where there is any emotional problem that arises within the family, when the patient is in the hospital, we certainly try and shield the patient as much as we possibly can from any bad news of any kind, a car wreck where other members of the family have been injured, and things like this. In the hospital it's where we have multiple patients in the same room, if there are conflicting situations for these people, you try to work this out as harmoniously as you can, and when you have to go to a waiting room area where you are going to meet a family where you have operated on a patient where this patient is in surgery, certainly, if you have bad news for these people, you try to take these people to a family area where you can talk with these people

> in privacy with respect to their needs for privacy, realizing too the effect that the news is going to have on other people waiting there too.

Source: Transcript 151-52, in Sixth Circuit's Appendix 221-22.

> I think if the discussion [among employees concerning unions] becomes volatile or hostile in any form, I think this very definitely would have the potential for adversely affecting the patients and the patient's families.

Source: Transcript 152, in Sixth Circuit's Appendix 222.